IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MADERN USA INC. A North Carolina Corporation, Plaintiff	)	
v.	)	CA. No.: 08C-10-132 FSS **(E-FILED)**
JAY PACKAGING GROUP, INC. A Delaware Corporation, Defendant.	)	

Submitted: January 7, 2009
Decided: April 30, 2009

ORDER

Upon Defendant's Motion to Dismiss – DENIED

This is an $800,000 commercial contract dispute stemming from Defendant's rejecting Plaintiff's custom-made spare parts. At this point, the court must decide whether the contract's arbitration clause has been triggered.

I.

The parties contracted through several purchase orders issued by Defendant to Plaintiff (collectively, "the contract"). Defendant ordered a third-party industrial press for its custom box manufacturing business. The press manufacturer

ordered special parts from Plaintiff for the press. Defendant, anticipating the press, purchased spare specialty parts and tools from Plaintiff. The parts were made and delivered to both Defendant and the manufacturer. After several tests by the manufacturer, the parts failed to operate as expected. Defendant rejected the press, returned the spare parts and cancelled its contract with Plaintiff.

On October 14, 2008, Plaintiff filed suit. On December 4, 2008, Defendant filed a motion to dismiss under Superior Court Civil Rule 12(b)(1), claiming the court lacks jurisdiction to hear Plaintiff's claim due to the arbitration clause in the parties' contract. Defendant claims the contract's Article 18(b) controls and, therefore, Plaintiff's claim is subject to mandatory arbitration.[1]

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[1] Article 18 reads:

> **Cancellation**. Buyer reserves the right to change or amend the specifications and to terminate the purchase order in whole or in part at any time by written or telegraphic notice. Such notice shall state the extent and effective date of such change or termination and upon receipt thereof the Seller shall, and to the extent directed, stop work under this purchase order and on any others of subcontractors issued hereunder, stop placement of further orders and subcontracts hereunder, and take any necessary action to protect property in Seller's possession in which Buyer has or may acquire an interest. (a) If cancellation occurs prior to commencement of production of the goods hereby ordered, Buyer's liability shall be limited to actual expenditures incurred by Seller on this order. (b) If production has commenced, the parties will promptly negotiate to determine the amount of fair compensation to be paid seller for such termination. Should the parties be unable to agree, then such fair compensation shall be determined by arbitration at Warwick, Rhode Island, in accordance with the rules for commercial arbitration of the American Arbitration Association then in effect. (c) If (sic) any event, Buyer shall make prompt payment of the amount due for goods delivered or services rendered prior to the effective date of termination. Seller shall not sell or otherwise dispose of any articles, work in process, or material connected with

The court heard oral argument on December 22, 2008. The argument narrowed the issue, suggesting that the case might turn on the meaning of "in any event," as used in the arbitration clause. The court directed the parties to submit supplemental memoranda discussing cases that specifically equate the term's meaning to "notwithstanding." The parties supplements were received on or before January 7, 2009.

II.

In pertinent part, the contract's cancellation clause, Article 18, reads:

> (a) If cancellation occurs prior to commencement of production . . . Buyer's liability shall be limited to actual expenditures incurred . . . . (b) If production has commenced, the parties will promptly negotiate to determine [payment]. . .[or as] determined by arbitration . . . . (c) [In] any event, Buyer shall make prompt payment of the amount for goods delivered or services rendered prior to the effective date of termination . . . .

Hence the question: What is the meaning of subsection (c) "[In] any event, Buyer shall make prompt payment of the amount due for goods delivered or services rendered"? Defendant argues that Article 18 offers only two payment scenarios after a cancellation notice.

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the performance of this order without the prior written consent of the Buyer. (d) This paragraph (18) shall not limit or affect Buyer's right to terminate this order under any preceding paragraph for default or otherwise.

Defendant claims that subsection (a) controls when cancellation occurs before production starts and subsection (b) controls at any time afterwards, including after delivery. Therefore, Defendant argues that even if Plaintiff actually delivered the goods and the amount due was known, because production had commenced, the parties are subject to subsection (b), which mandates arbitration.

Defendant argues that subsection (c) must be considered in addition to subsections (a) and (b). Defendant alleges that subsection (c) merely applies when payment under subsections (a) and (b) has been determined, that subsection (c)'s "[in] any event" is synonymous with "in either event (a) or (b)." Further, Defendant contends that if Plaintiff's claim were considered solely under subsection (c), Plaintiff could circumvent arbitration because the phrase "or services rendered" could be inferred to apply to production that has commenced.

Defendant's supplement cites a few extrajurisdictional cases, some of which hold "in any event" to mean "no matter what else," and others finding the idiom's definition to be determined by the context in which the phrase appears. Defendant relies on an Oklahoma case, *Wooten v. Hall*,[2] for the proposition that "in any event" translates to "in any event or situation described by the preceding portions

[2] 442 P.2d 334 (Ok. 1968).

of the subdivision."[3] Defendant argues that under *Wooten*, subsection (c) only applies after subsection (a) or (b) has been satisfied.

III.

Unless otherwise agreed, a claim's substantive arbitrability is decided by the court.[4] Arbitrability raises two issues: (1) whether the arbitration clause is broad or narrow, and (2) whether a party's underlying claim, on its face, falls within the arbitration clause's scope.[5] In deciding arbitrability, the court may not consider the underlying claim's merits, even if the claim seems frivolous.[6] Delaware public policy favors arbitration.[7] Therefore, any doubt as to arbitrability is resolved in favor of arbitration.[8]

Article 18 controls purchase order cancellations "in whole or in part at any time." The article establishes how to properly cancel an order, what a cancellation shall contain, and that upon cancellation the seller is required to stop production. Article 18 then breaks into three subsections concerning the

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[3] *Id.* at 336.

[4] *SBC Interactive, Inc. v. Corp. Media Partners*, 714 A.2d 758, 761 (Del. 1998).

[5] *Parfi Holding AB v. Mirror Image Internet, Inc.*, 817 A.2d 149, 155 (Del. 2002).

[6] *SBC Interactive,* 714 A.2d at 761.

[7] *Id*.

[8] *Id*.

cancellation's timing and the corresponding payment owed. Therefore, a cancellation's timing is a determinative factor.

Subsection (a), which is not in dispute, requires payment for pre-production cancellation based on "actual expenditures incurred," rationally referring, for example, to the cost of materials. After production starts, subsection (b) requires payment based on the parties' negotiations or, if that fails, arbitration. It is plain that the terms "negotiation" and "arbitration" are used because subsection (b) covers the situation where payment would probably be unliquidated. In that event, the parties, or the arbitrator, would need to determine the labor and material costs. As to that, subsection (b) and its arbitration requirement is narrow.

Subsection (c), on the other hand, unambiguously requires "prompt payment" for "goods delivered or services rendered," plainly addressing post-delivery cancellations. The idiom "[in] any event" means "regardless of what happens."[9] Therefore, in context here, subsection (c) kicks-in as soon as items are delivered and the amount owed is known, regardless of how the amount was derived. For example, if a party submitted a cancellation notice during production, but after a partial delivery, payment in full would be owed, at least, on those items already delivered. Subsection (c) prevents a buyer from refusing to pay for delivered items simply

[9] WEBSTER'S UNABR. DICTIONARY OF THE ENGLISH LANGUAGE 671 (2001).

because the buyer cancelled while other goods were in production. This analysis follows from Article 18's separate subsections and flow.

Despite Defendant's argument, the phrase "or services rendered" does not change the analysis. "[O]r services rendered" follows the term "delivery," and simply refers to services performed after or simultaneously with delivery, such as installation. Because Article 18's subsections are categorized in relation to the manufacturing process – pre-production, production, and delivery – subsection (c) cannot be read to include any production or pre-delivery labor. Therefore, in subsection (c)'s context, "or services rendered" does not concern production labor, or otherwise allow a party to circumvent subsection (b)'s arbitration clause. "Or services rendered" applies solely to delivery-related expenses.

The parties do not dispute that a proper cancellation was received after the parts were produced and delivered. Therefore, Plaintiff's claim for breach after delivery, on its face, falls under subsection (c). Clearly, subsections (a) and (c) allow litigation, whereas subsection (b) is strictly limited to arbitration. Again, that holding reflects the qualitative differences between subsection (a), (b) and (c) claims. If Defendant intended arbitration for post-delivery, or even pre-production situations, it easily could have made that clear.

IV.

For the foregoing reasons, Defendant's motion to dismiss, or in the alternative to stay pending arbitration, is **DENIED**. And so, the court, not an arbitrator, will determine whether Plaintiff is entitled to its liquidated damages and, by the same token, whether Defendant wrongfully refused Plaintiff's parts.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (civil)
David Primack, Esquire
Michele Sherretta Budicak, Esquire